Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-852

PRESTON CARROLL COMPANY, INC. and
C.F.W. CONSTRUCTION COMPANY, INC.,
Petitioners for Certiorari

v.

MORRISON ASSURANCE COMPANY, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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STATEMENT OF THE CASE

Any defects or omissions in the Statement submitted by Petitioners (hereinafter sometimes referred to as the "Joint Venture") are in the nature of argumentative assertions and are responded to in the body of Respondent's Brief.[1]

1. Pursuant to Rule 28.1, United States Supreme Court Rules, Respondent informs the Court that Morrison Assurance Company is wholly owned by First Southern Insurance Company, which is wholly owned by First Southern Financial Corporation.

SUMMARY OF THE ARGUMENT

This case presents no significant federal question, and indeed the only potential federal question ought not to be reached at all. The only federal question which might be reached is whether the Georgia Supreme Court transgressed Petitioners' right to due process of law by retroactively applying a prior decision which overruled a still-earlier case. The Georgia Supreme Court held that the prior decision did not overrule the earlier case; the two earlier decisions were consistent. This holding was a determination of state law and should not be disturbed.

ARGUMENT

I. THE PRESENT CASE TURNS PRIMARILY ON CONSIDERATIONS OF STATE SUBSTANTIVE LAW AND INVOLVES NO IMPORTANT NEW QUESTIONS OF FEDERAL LAW, NOR DOES THIS CASE RAISE ANY ISSUES WHOSE IMPACT EXTENDS BEYOND THE IMMEDIATE PARTIES.

The Joint Venture argues that it has been denied due process of law under the Fourteenth Amendment of the Constitution, and that the decision of the Georgia Supreme Court in this case violated the "doctrine of nonretroactivity" set out in Chevron Oil Company v. Huson, 404 U.S. 97, 92. S.Ct. 349, 30 LEd2d 296 (1971) (hereinafter referred to as "Chevron Oil"). Having

asserted what seem to be two legal bases for its Petition, the Joint Venture then goes on to describe this case as an "opportunity for this Court to clarify its holding in Chevron Oil". Petitioners' Brief at 19. Petitioners' arguments reveal either a strained attempt to create an issue that satisfies the requisites of Rule 17 of the Rules of the Supreme Court ("Considerations Governing Review on Certiorari") or a fundamental misunderstanding of federalism.

The Due Process Clause is applicable to the states in the exercise of their sovereign power, and it establishes the outermost limits of such power. The sovereign power of a state is usually expressed by legislative acts

and implemented by the executive branch, and the Due Process Clause is most commonly regarded as a limitation on such expressions and implementations of power.

In the case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930), however, this Court established that the Fourteenth Amendment may also limit the power of a state judicial body to overrule past precedent under certain limited circumstances. The situation presented in the Brinkerhoff case involved a litigant who had been denied a forum -- any forum at any time -- in which to assert its right to seek an abatement of a portion of a state tax assessment. This complete denial of any opportunity to litigate its rights had

been brought about by a decision of the state supreme court which clearly and expressly overruled a prior decision of the same court regarding the proper forum in which to seek such an abatement. The overruling of the prior decision had the effect of requiring the plaintiff to have pursued a remedy which in fact never existed. This Court concluded that the absolute lack of any opportunity for the plaintiff to assert its rights at any time denied that plaintiff the due process required by the Constitution. Brinkerhoff therefore established that the Due Process Clause will bar the retroactive application of a state court decision where that decision:

1. expressly overrules past precedent; and

2. results in a "deprivation of plaintiff's property . . . without its ever having had an opportunity to defend against the [taking]." (Emphasis added) Brinkerhoff at 679, 453.

The decision in Brinkerhoff goes so far, and no further. In particular, the Brinkerhoff decision leaves intact the right of a state supreme court to determine questions of state law free from oversight by the federal courts, at least in the absence of patent abuse. This court in Brinkerhoff observed that "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or

otherwise confer appellate jurisdiction on this court." (Emphasis added.) Brinkerhoff at 680, 454. (See also Brinkerhoff at 680, 454, footnote seven.)

To the extent that the doctrine of nonretroactivity set out in Chevron Oil is more restrictive of a court's power to give retroactive effect to its rulings than the Constitution, then Chevron Oil would not be applicable by its own force to state courts. The reason for this conclusion is obvious. The limitations of the Fourteenth Amendment apply directly to the exercise by the states of their sovereign power. However, mere federal decisional law, regardless of whether it may be grounded in sound common law precedent or based upon enlightened equitable principles, is not

binding authority upon state courts. Similarly, no matter how admirable the considerations set forth in Chevron Oil, or how beneficial the test, that case does not bind the Georgia Supreme Court. Accordingly, this case presents no "opportunity" for this Court to elaborate on its holding in Chevron Oil.

II. THE HOLDING BY THE GEORGIA SUPREME COURT THAT ITS TWO PRIOR DECISIONS WERE CONSISTENT -- AND THAT THERE WAS THEREFORE NO RETROACTIVE APPLICATION OF LAW SUCH AS MIGHT VIOLATE DUE PROCESS -- SHOULD NOT BE SUBJECT TO REVIEW ON CERTIORARI UNLESS THE GEORGIA COURT ACTED IN A MANNER THAT WAS PATENTLY EVASIVE OF OR DISCRIMINATORY AGAINST FEDERAL RIGHTS.

The true essence of the Joint Venture's arguments is that the Georgia Supreme Court has erred in reconciling

its two prior decisions; and that the later of these two prior decisions actually did overrule the earlier so as to trigger due process protections. However the determination by the Georgia Supreme Court in this case that its two prior decisions were consistent was a holding going to substantive state law, and it should not be subject to review on certiorari.

The role of a state court in elucidating the character of one of its own decisions -- an unusual topic -- was addressed by this Court in the case of Tibbs v. Florida, 457 U.S. 31, 46-47, 102 S.Ct. 2211, 2221, 72 LEd2d 652 (1982). That case concerned the application of the Double Jeopardy Clause in a Florida murder prosecution. The defendant in

that case was convicted by the jury and sentenced to death, but the conviction was overturned by the Florida Supreme Court, which found numerous "weaknesses" in the evidence produced by the State. Id. at 35-36, 2214-2215. The Florida Supreme Court remanded the case, but before a new trial was commenced this Court decided the cases of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Stated concisely, the holding in Burks and Greene were to the effect that the Double Jeopardy Clause bars a second trial after an appellate court has found that the evidence presented by the state in the first trial was insufficient to sustain a conviction. The Florida trial

judge subsequently determined that a retrial of Mr. Tibbs would violate the double jeopardy principles articulated in those cases and dismissed the prosecution. The State of Florida then appealed the trial court's refusal to retry the defendant, confronting the Florida Supreme Court with the task of analyzing and explaining the reference to "weaknesses" in the prior decision it had rendered in the same case. Tibbs at 37-38, 2215-2216. In the second appeal, the Florida Supreme Court held that its first decision was based upon the weight of the evidence, and not upon the sufficiency of the evidence, that Burks and Greene were not applicable, and that

the defendant could be retried without offending the Double Jeopardy Clause. Id.

Upon certiorari, this Court affirmed the substantive conclusions of the Florida Supreme Court regarding applicability of the Double Jeopardy Clause. More relevantly to the present case, this Court also recognized the validity of a state court's construction of its own prior opinion:

> Any ambiguity in Tibbs I, finally, was resolved by the Florida Supreme Court in Tibbs II. Absent a conflict with the Due Process Clause . . . that court's construction of its prior opinion binds this Court."

Tibbs at 47, 2221. The attitude thus articulated is one of deference to a state court in establishing, as a matter

of law, the meaning of its own past pronouncements. Such deference is an aspect of the deference accorded state courts in construing state substantive law generally, and stands on the same judicial principles of federalism and comity.

The deference accorded a state court is not without limit. As stated in Tibbs, supra, the limit is determined by the Due Process Clause. In order to preserve and protect due process limitations, this Court may be called upon to examine the review provided by a state supreme court in order to determine that that review was not patently evasive of or discriminatory against federal

rights. Cf. Fay v. Noia, 372 U.S. 391, 432, 83 S.Ct. 822, 845, 9 L.Ed.2d 837 (1963).

In Fay, Justice Brennan, speaking for the Court, noted the general policy of declining to review federal questions which may have been involved in a decision by a state supreme court if there were adequate and independant state substantive grounds to support the outcome reached by the state court. The Justice observed that the United States Supreme Court "has deferred to state substantive grounds so long as they are not patently evasive or discriminatory against federal rights . . . " Id.

The limits on federal deference to a state court's determination of state law referred to in Tibbs, clearly do not

require this Court to act as a state supra-supreme court by providing an appellate review de novo of questions of state substantive law. The issue now before this Court, then, is not whether the Georgia Supreme Court was correct in concluding that the holdings in two of its own previous cases were consistent--which it was--but whether the review provided by the Georgia Supreme Court was so egregiously and obviously erroneous as to be patently evasive or discriminatory against federal rights. It was not.

III. THE SUBSTANTIVE CONCLUSIONS REACHED BY THE GEORGIA SUPREME COURT IN THIS CASE DID NOT VIOLATE THE "PATENTLY EVASIVE OR DISCRIMINATORY AGAINST FEDERAL RIGHTS" STANDARD SET OUT IN FAY v. NOIA, AND IN FACT RESULTED IN A SOUND DECISION.

The substantive issues in this case involve a series of decisions by both the Georgia Court of Appeals and the Georgia Supreme Court dealing with the various provisions of Title 103 of the Georgia Code Annotated, which in turn dealt generally with surety or guarantor relationships.

The first relevant case, and the case which established the analysis which guided every subsequent relevant decision, was Traveler's Indemnity Company v. Sasser and Company, 138 Ga. App. 361, 364, 226 S.E.2d 121. (1976). The Court of Appeals in Sasser addressed the question of the applicability of a specific statute within Title 103 to a situation involving a compensated surety, and held that:

> Code §103-202 . . . does not here apply where the defendant is a compensated surety. Such compensated sureties are treated as guarantors under Code §103-101 since there is consideration flowing to the defendant for granting and issuing the bond.

Sasser at 123. Code §103-101, a definitions provision expressly defined the term "surety" as referring to an uncompensated surety, while a "guarantor" received a benefit for its undertaking. The section analyzed in Sasser referred only to sureties.

A year later the Georgia Court of Appeals in Noland Company v. Commercial Insurance Company, 141 Ga. App. 285, 233 S.E.2d 259 (1977) applied the statute involved in the present case to discharge what was obviously a compensated corporate surety. However, the court in

Noland did not expressly address the question of the distinction between sureties and guarantors.

Next, in Brock Construction Company, Inc. v. Houston General Insurance Company, et al., 144 Ga.App. 860, 243 S.E.2d 83 (1978), the Court of Appeals adopted the reasoning applied in Sasser in holding that yet another statute within Title 103 did not apply to compensated sureties:

> The import of Sasser is clear; compensated corporate sureties engaged in writing surety bonds for a profit are not such sureties within the meaning of Title 103 so as to generally enjoy the protection afforded by all of its sections." (Emphasis added.)

Houston, 144 Ga. App. at 861. (A close reading of the Court of Appeals decision in Houston reveals that all of its statements regarding Title 103 are carefully qualified in light of the rational underpinnings of the Court's holding.) The court then found that the common law produced the same result for the compensated surety in that case as the statute would have for an uncompensated surety.

The Georgia Supreme Court granted certiorari to review the decision in Houston, and affirmed the Court of Appeals' holding in its entirety. Houston General Insurance Company, et al v. Brock Construction, Inc., 241 Ga. 460, 264 S.E.2d 316 (1978). Presumably because almost all of the statutes

contained in Title 103 did refer only to sureties, the opinion of the Georgia Supreme Court also contained the following statement: ". . .Title 103 was not intended to govern compensated sureties." Houston at 463. However, the Georgia Supreme Court cautioned that "[w]hether particular rules established under that Title [103] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Houston at 464.

After the Georgia Supreme Court's decision in Houston, a question was certified to the Georgia Supreme Court from the United States Court of Appeals for the Eleventh Circuit inquiring specifically whether Section 103-205 of the Georgia Code, the provision involved

in the present case, applied to compensated sureties. In Balboa Insurance Company v. A. J. Kellos Construction Company, 247 Ga. 393, 276 S.E.2d 599 (1981), the Georgia Supreme Court held that Section 103-205 did apply to compensated as well as uncompensated sureties. That holding was based upon the same reasoning and analysis utilized in the Houston decision. The Court concluded that Section 103-205 clearly must apply to compensated sureties because Section 103-205 by its own terms included "guarantors" within its scope, and guarantor was defined in Section 103-101 as meaning a compensated surety.

In the present case, the Georgia Supreme Court was called upon to look back and reexamine its holdings in

Houston and Balboa. What it saw was two cases governed by the same reasoning and analysis. That reasoning and analysis had previously been enunciated -- perhaps more clearly -- by the Georgia Court of Appeals in two opinions, including the opinion affirmed in Houston. Moreover, the only previous case to actually apply the specific statute in question had applied that statute to discharge a compensated surety, as in both Balboa and the present case.

The Georgia Supreme Court also recognized that some of the language in its opinion in Houston was overly broad, and it has properly characterized that language as obiter dictum, upon which the Joint Venture was not entitled to rely. Not only was this characterization not

patently evasive of or discriminatory against federal rights, it was also fundamentally correct.

The distiction between holding and dictum is not new, and it is essential to a legal system in which judicial determinations must be justified but also must be limited to the controversy before the Court. In Cohen v. Virginia, 6 Wheat 264, 399, 5 L.Ed. 257, 290 (1821), Justice Marshall expressed the principle as follows:

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not control the judgment in a subsequent suit, when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care and considered in its full

> extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

This Court also observed in United States v. Eaton, 169 U.S. 331, 348, 18 S.Ct. 374, 42 L.Ed. 767, 773 (1897), that "[g]eneral language in an opinion must be confined to the precise state of facts with reference to which it was used and does not warrant the inference that it was intended to overrule a doctrine laid down in previous cases which are not even referred to." And in United Gas Improvement Company v. Continental Oil Company, 381 U.S. 392, 404, 85 S.Ct. 1517, 14 L.Ed 2d 466, 474 (1965), this

Court conceded that language in previous case was "unquestionably broad," but went on to observe that:

> Concepts of stare decisis in statutory interpretation apply to the holdings with which the case-by-case method of decision surrounds a statute. To recognize no difference between the transfers [in the earlier case] and those in issue here, and in the name of stare decisis to hold that Commission jurisdiction depends on the form rather than the substance of the transaction, would turn the case-by-case process against itself. (Emphasis in original.)

> The thrust of these admonitions is clear: only the holding of a court on the precise controversy before it is the law for purposes of stare decisis, and successive opinions shall not be read so as to produce a conflict. The decision of the Georgia Supreme Court in this case was in accord with these principles and was correct.

CONCLUSION

Petitioners would have this Court conduct what would be the third appellate review of the relationship between the Houston and Balboa decisions, and substitute its opinion for that of the Georgia Supreme Court. Respondents

respectfully contend that the Georgia Supreme Court's conclusion was a legitimate determination of state substantive law which precluded reaching Petitioners' federal claims, and that the Petition should there be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

COMES NOW, DeWitte Thompson, who after being duly sworn deposes and states:

I have this day served Henry Angel, Esq., Attorney for Petitioners with three copies of this OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA by depositing copies of same

in the United States Mail with adequate postage thereon addressed as follows:

Henry Angel, Esq.
SAVELL, WILLIAMS, COX
and ANGEL
2300 The Equitable Bldg.
100 Peachtree Street
Atlanta, Ga. 30343-6201

This 13th day of December, 1985.

DeWitte Thompson,
Attorney for Respondent

Sworn to and subscribed before me this
13th day of December, 1985

Notary Public
Jeff B. Slagle
My commission expires July 26, 1987.